

SERVICE DATE - JANUARY 21, 2004

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34428

PORT AUTHORITY OF NEW YORK AND NEW JERSEY—PETITION FOR
DECLARATORY ORDER

Decided: January 20, 2004

By a petition for declaratory order filed on October 22, 2003, the Port Authority of New York and New Jersey (Port Authority) seeks an order declaring that: (1) the construction by petitioner of a connector between the line of the former Staten Island Railroad (SIRR) and the rail lines owned and operated by Norfolk Southern Railway Company (NS), CSX Transportation, Inc. (CSX), and Consolidated Rail Corporation (Conrail) (known as the Chemical Coast Secondary Line); and (2) any operation over this newly constructed connector, do not constitute an extension of a line of railroad and therefore require no Board approval. The proposed connector would be a 3,650-foot-long track between an abandoned line of the former SIRR immediately west of a lift bridge over the Arthur Kill (the body of water that separates Staten Island, NY, from New Jersey), and the Chemical Coast Secondary Line.

On November 18, 2003, the Board served and published in the Federal Register (68 FR 65113) a notice instituting a declaratory order proceeding and requesting comments on the Port Authority's petition. Comments were timely filed by Governor George E. Pataki of New York, U.S. Congressman Vito Fossella of New York, James P. Molinaro, President of the Borough of Staten Island, the New York City Economic Development Corporation (NYCEDC), Vanbro Corporation (Vanbro), and Pratt Industries (USA) (Pratt). The Port Authority filed a reply to the comments on December 30, 2003, requesting that the Board grant its request for a declaratory order by January 15, 2004, to permit the Port Authority to award bids for the construction based on proposals due to expire on that date.

BACKGROUND

The SIRR was abandoned in 1990 and 1991 and its lines were acquired by the States of New York and New Jersey. The Port Authority and the NYCEDC are undertaking a project to revitalize and reactivate rail operations over these lines. As to one of the lines intended to be reactivated, the Port Authority has indicated that a notice of a modified certificate of public convenience and necessity will be filed pursuant to 49 CFR 1150.21-.24, advising of the designation of CSX and NS as the modified certificate operators of certain lines of the SIRR that had been abandoned and then acquired

by the City of New York and the State of New Jersey. Conrail owns the Chemical Coast Secondary Line and, as a result of that ownership, has the right to operate over it. And because this line is part of the North Jersey Shared Assets Area, CSX and NS also have the right to operate over it. See CSX Corp. et al.–Control–Conrail Inc. et al., 3 S.T.B. 196, 228 (1998).

As to another of the lines proposed to be reactivated, on October 29, 2003, the NYCEDC, which manages the New York properties of the former SIRR on behalf of New York City, filed a petition for a declaratory order in STB Finance Docket No. 34429, The New York City Economic Development Corporation–Petition for Declaratory Order, concerning the proposed construction of switching, industrial lead, and spur track on the Travis Branch of the SIRR, located on Staten Island. On December 10, 2003, the Board served and published in the Federal Register (68 FR 68968) a notice instituting a declaratory order proceeding and requesting comments on that petition. Comments in that proceeding are due January 30, 2004, with replies due February 19, 2004.

Petitioner states that the connector will replace various other connections that have historically existed and currently exist between the SIRR line and the NS, CSX, and Conrail lines at Cranford, Linden, and Bayway, NJ, and will replace the connections provided by car float between St. George and Port Ivory, NY, and Port Newark, NJ. As to the latter, the Port Authority states that the proposed connector will run parallel to a route that historically existed, by which the line of the SIRR connects to the Chemical Coast Secondary Line by way of the Port Ivory float bridge and the Port Newark Port Authority float bridge. Prior to its abandonment, the SIRR line was used to interchange freight with several rail carriers via car float operations. These car float operations, also called lightering, employed various types of towed or self-propelled marine equipment. Car floats with railroad tracks were towed between waterfront terminals on the New York Harbor. Rail cars moved over tracks to the piers at the terminals, over the float bridges to the car floats, and by water to the float bridge at the destination terminal. In 1934, the ICC held that the term “railroad” includes “all . . . lighters . . . used by or operated in connection with any railroad,” and that the term “transportation” includes “vessels and all instrumentalities and facilities of shipment or carriage.” Lighterage Cases, 203 I.C.C. 481, 511-12 (1934).

POSITIONS OF THE PARTIES

Here the Port Authority argues that the proposed connector does not involve the construction of an “extension” of a line of railroad, nor does it constitute an “additional” line, the construction of which would require Board approval pursuant to 49 U.S.C. 10901. It asserts that construction of the connector will neither open up new traffic routes nor expand service into new territory. Rather, petitioner argues that the connector merely permits a more efficient route that is an alternative to a route that historically existed, which could be reactivated without Board approval. Specifically, the Port Authority maintains that it controls and could reactivate the Port Ivory and Port Newark Port Authority

float bridges to form a route that parallels the route provided by the proposed connector, and has the same origins and destinations, without Board approval.

The six commenters support the construction of the proposed connector and the reactivation of the SIRR lines. Governor Pataki states that construction of the proposed connector and reactivation of the SIRR lines have the potential to provide significant economic growth opportunities for The Howland Hook Marine Container Terminal (Howland Hook) and consequently Staten Island. He further states that the Port of New York and New Jersey lies in the center of the largest consumer market in the world, serving more than 18 million people, and he argues that expansion of rail is an environmentally friendly means of accommodating growing cargo volumes moving into and out of the region.

Congressman Fossella, who represents the 13th District of New York, states that this project holds great economic significance for both the Borough of Staten Island and the Port of New York and New Jersey. He asserts that the discontinuation of service over the SIRR lines has led to increased highway traffic in this already congested area, which interferes with Staten Island's businesses, particularly Howland Hook, Staten Island's largest private employer. Congressman Fossella thus argues that construction of the connector will take large numbers of trucks off the roads, thereby reducing congestion and air pollution associated with emissions.

Mr. Molinaro, President of the Borough of Staten Island, comments that, prior to its abandonment, the SIRR line was a critical means for the efficient movement of goods and cargo to and from Staten Island. He argues that the absence of this rail line has limited the economic growth potential of the region and contributed to a measurable increase in truck traffic. He states that reactivation of the SIRR line has the potential to attract new business, increase job opportunity, and aid in the expansion of existing businesses, particularly Howland Hook. He maintains that reactivation of the SIRR line is vital to the economic growth of the community.

NYCEDC, a partner with the Port Authority in the SIRR line reactivation project, agrees with the Port Authority's argument that the proposed connector does not constitute an extension of a line of railroad. NYCEDC adds that reactivation of the SIRR line will promote much needed economic development for Staten Island and allow business growth to occur at Howland Hook, Visy Paper (a wholly owned subsidiary of Pratt), and Vanbro. NYCEDC states that this project will also reduce regional truck traffic and its commensurate air pollutants.

Neil Vanderbilt, Jr., President of Vanbro, an owner of property adjacent to the Travis Branch of the SIRR, agrees that the proposed connector does not constitute an extension of a line of railroad and does not require Board approval. He states that Vanbro, a major distributor of aggregates and materials, will be an industrial user of the reactivated SIRR line, and he firmly supports the rehabilitation and reactivation of the SIRR line. Mr. Vanderbilt further states his belief that the project will not

generate any significant adverse environmental or economic impacts to Vanbro or its operations and will greatly reduce truck traffic in this highly congested area.

Helmut Konecsny, the Chief Executive Officer of Pratt, another owner of property adjacent to the Travis Branch of the SIRR, also supports the Port Authority's argument that the proposed connector does not constitute an extension of a line of railroad and therefore does not require approval of the Board. Mr. Konecsny maintains that completing the rehabilitation of the SIRR line as expeditiously as possible is of vital importance, not only to the businesses that will make use of it but also to the surrounding community. He states that Visy Paper constructed a recycled paper mill on Staten Island in 1997 in anticipation of the SIRR line being fully functional, so that at least half of the output of the facility could be shipped by rail, thereby eliminating truck traffic and considerable extra transportation costs. He maintains that reactivation of the SIRR line is long overdue and sorely missed by area businesses and the community at large.

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. 554(e) and 49 U.S.C. 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. The issue before the Board is whether petitioner's construction of a connector requires agency approval.

Under 49 U.S.C. 10901(a), a person may "construct an extension to any of its railroad lines. . . [or] construct an additional rail line . . . only if the Board issues a certificate authorizing such activity. . . ." "Extension" and "additional rail line" are not defined in the statute. As interpreted by the Supreme Court, however, the construction of an extension to a rail line, or an additional rail line, is one that enables a carrier to penetrate or invade a new market. Texas & Pac. Ry. v. Gulf, Etc., Ry., 270 U.S. 266, 278 (1925) (Texas & Pacific). See also City of Detroit v. Canadian National Ry. Co., et al., 9 I.C.C.2d 1208, 1216 (1993), aff'd sub nom. Detroit/Wayne County Port Authority v. ICC, 59 F.3d 1314 (D.C. Cir. 1995) (St. Clair Tunnel).

Various agency decisions have implemented this statutory provision. In St. Clair Tunnel, for example, the ICC found that the construction of a new tunnel 90 feet from an existing tunnel to permit double-stack service did not involve construction of an "extension" of the line or an "additional" line. The ICC noted that "[m]any carrier improvements to their existing system lie outside our jurisdiction. For example, carriers have expanded single-track lines to double-track lines by building a new track parallel to the existing one. These projects are often extensive and require substantial capital investment. They may have a profound effect on the carriers undertaking them, their customers and their competitors. But we do not take jurisdiction over them. Double-tracking is an improvement to an existing rail line. It is neither an extension of the line nor a construction of an additional one." 9 I.C.C.2d at 1218-19. In another case, the Board characterized the rehabilitation and reactivation of

16.7 miles of track that paralleled a railroad's existing right-of-way as an improvement that "augment[ed] the capacity of existing main line operations by eliminating the single track bottleneck . . .," and concluded that no authority was required. Union Pacific RR Co.—Petition—Rehabilitation of MO-KS-TX RR, 3 S.T.B. 646, 651 (1998) (UP Rehabilitation).

It is not clear from the Port Authority's petition exactly who has or will have rights to operate the various pieces of track that will be involved in this operation. But the essence of the holdings in Texas & Pacific, St. Clair Tunnel, and UP Rehabilitation is that a carrier may, without additional authority from the agency, construct facilities to better provide a service it is already authorized to provide. Here, the proposed construction of a short connector would directly connect two crossing lines, where traffic can now move over a less direct route. These factors are important in any finding that a carrier is not invading new markets or expanding service into new territory. Therefore, an entity with the right to operate over the Chemical Coast Secondary Line, the right to operate a lighterage service between Port Ivory and Port Newark, and the right to operate over the old SIRR line between Port Ivory and the point at which the SIRR line crosses the Chemical Coast Secondary Line may build the proposed connector without additional authority from this agency. If the Port Authority has the authority to do those things it may build the connector without Board authority. So may any other entity that has those rights. The Port Authority may build that connector without Board authorization if it is the agent of that entity or if the construction would not otherwise permit any carrier to enter new markets or invade new territory.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition for declaratory order is granted as specified herein.
2. This proceeding is discontinued.
3. This decision is effective on the date of service.

By the Board, Chairman Nober.

Vernon A. Williams
Secretary